No. 3873

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LAM FOOK YOU,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

M. A. THOMAS,
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I.

Statement of Facts.

The appellant upon arriving at the port of San Francisco from China made application to enter the United States as a citizen, claiming to be the foreign born son of Lam Kim Tun, a citizen of the United States whose citizenship was satisfactorily established by court papers. The application of appellant was denied after a hearing before a board of special inquiry, it being contended by the immigration authorities that he was not the son of Lam Kim Tun, and upon appeal to the Secretary of Labor the decision of the board was affirmed.

Upon habeas corpus proceedings the District Court sustained a demurrer to the petition of appellant for a writ of habeas corpus, and denied appellant's petition for discharge. From that judgment the appellant takes this appeal.

II.

Questions Involved.

Appellant has assigned as error:

First: That the court erred in sustaining the demurrer to the petition for a writ of habeas corpus herein.

Second: That the court erred in denying the petition for discharge of the detained and appellant herein.

Third: That the court erred in holding that it had no jurisdiction to issue a writ of habeas corpus as prayed for in the petition herein.

Fourth: That the court erred in not holding that the Commissioner of Immigration and the Secretary of Labor acted beyond their statutory authority and without jurisdiction in denying the application of the detained to enter the United States, he having furnished evidence satisfactory and establishing his status as the son of a native born citizen of the United States.

Fifth: That the court erred in not holding that the action of the said Commissioner and the said

secretary in denying the application of the detained to enter the United States was an abuse of the discretion committed to them by the statute in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statute.

Sixth: That the court erred in holding that the evidence presented before the immigration authorities upon the application of the detained to enter the United States was not of such conclusive kind and character establishing the birth of the father of the detained within the United States, and showing that the detained is the son of a native-born citizen thereof. That it was an abuse of discretion on the part of the said Commissioner and the said Secretary to deny the said detained the right to admission into the United States, and to refuse to be guided by said evidence.

Seventh: That the court erred in holding that the said Commissioner and Secretary did not deny the detained a fair hearing and consideration in this case, to which he was entitled under the law.

III.

Argument.

The reasons for denying the application of the petitioner to enter the United States as the son of Lam Kim Tun are set forth fully in the statements of the chairman of the board of special inquiry, which statements appear fully in the record.

These reasons are restated by the Assistant Commissioner General in his decision dated April 22, 1921, also appearing fully in the record. The decision to exclude is based on nine alleged discrepancies in the testimony and three additional reasons. I will review these discrepancies and additional reasons briefly:

(1) The father testifies that the applicant was born in August, 1913, and was at the time of the hearing seven years old.

The board of inquiry says after observation that he is eleven or twelve years of age, and Dr. P. J. Hickey in a written statement which appears in the record says he is within one year either way of ten years. Neither the report of the physician nor the opinion of the board of inquiry is supported by any scientific data whatever.

See *Woo Hoo v. White,* 243 Fed. 543, where this court says:

> "The doubt expressed by the Commissioner General as to the alleged age of the applicant was based upon a certificate of two surgeons that, after a careful consideration of the physical characteristics, they were of the opinion that 'his age is within one year either way of 23 years'. It is not represented that the certificate was based upon any scientific data, or otherwise than upon the general appearance of the applicant. Upon such a question the opinion of a surgeon is believed to be of no greater value than that of a layman, and in either case it has but little probative value to show a difference of age of only two years."

With regard to the question of age, the assistant Commissioner in his opinion says:

> "Standing alone in an otherwise favorable case this one circumstance would hardly be sufficient to justify exclusion."

The Commissioner then proceeds to enumerate a series of other circumstances and to array them against the applicant, almost everyone of which circumstances should be disregarded, unless it be decided conclusively that the boy is eleven or twelve years of age instead of only seven. It will be seen from a review of these other circumstances that the question of age is really the determining factor, and the board and the Commissioner having determined the question of age adversely to the contention of the applicant and of his father, make that determination conclusive for the reason that without such determination the other circumstances would not be adverse to the applicant's contention.

(2) It is asserted by the chairman of the board and by the Assistant Commissioner that the father testified that his first wife died while he was at home in China on his last trip, while the applicant testified that she died while the father was in the United States.

The father has not testified, and the record does not show he testified, that he was at home when his wife died, and even if he had so testified unless we take it as absolutely proven that the boy is eleven or twelve years of age instead of only seven, he was only four years old when his mother died

and his recollection of that event would not be worth anything.

(3) It is further stated by the chairman of the board and the Assistant Commissioner that the father testified the boy's mother had bound feet, while the applicant testified she had natural feet. It requires no argument to convince this court that if the mother died when the boy was four years old his testimony as to her feet, taken when he was seven years old, would be of no value.

(4) Another discrepancy or point urged against the applicant is that he does not know the names of any of his grandparents. The record shows that they all died long before applicant was born, that his father lived in the United States and had no opportunity to tell him about his ancestors, and that his mother died when he was only four years old, according to his father's testimony.

I urge these points for the purpose of making it clear to this court that except for the unscientific guess that the boy was ten or more years old at the time of his application to enter the United States, these discrepancies are of no importance at all.

(5) The identifying witness Lam Fook Loy testified that he met the applicant and his brother Fong at the See Gew Market before bringing him to the United States. The applicant says he first met the witness at Hong Kong where he went with his brother Fong. This is no discrepancy for on

the face of it it appears that applicant traveled with his older brother from the See Gew Market to Hong Kong, and the presence of Lam Fook Loy would not be impressed upon him until the older brother left him in the sole care of Lam Fook Loy at Hong Kong.

Such testimony might be called a discrepancy if given by an adult or by a child of more mature years, but to hold it against a boy who claims to be seven years old, whose father swears he is seven years old, and who the immigration authorities by observation say is ten years of age or more, is unfair and not in accordance with the fair dealing which should be accorded to citizens of the United States, or even to an alien.

(6) Another point raised by the immigration authorities as a ground for exclusion is a supposed resemblance between the applicant and the additional witness as set forth in the decision to exclude. Such an argument is unworthy of an officer of the government of the United States, and is as unscientific as the guess at the age of the applicant. This supposed resemblance is in line with a theory which was apparently in the minds of the board that the applicant is a son of the alleged father's wife by Huey Lim the additional witness who testified that he carried some money from the father to his wife in 1909 or 1910. There is no doubt but that the decision of the board that the applicant was ten or eleven years old at the time of his application for admission has a direct relation to and is

based upon the date when Huey Lim visited China, to wit, 1909-1910. Such a line of reasoning can only be indulged in by a board of persons determined to prevent the entry of every Chinese applicant by suspicions where evidence is lacking, and is not worthy of a board which is fairly searching for the truth.

(7) The chairman of the board says in his statement that when the father returned from China in 1902 he stated to the immigration authorities that he was not married, and that in 1910 (see file 10387/61) he said he was married to Louie Shee in 1894. The records do show such statements. The chairman further says that when confronted with his former statement the father offered no satisfactory explanation. I do not know what kind of an explanation would be required in order that it be satisfactory to a board which has arrayed the kind of evidence above set forth against this youthful son of an American citizen. It appears that the explanation which was so unsatisfactory to the board was that the father did not remember being asked the question as to whether or not he was married, but asserted that he was married and that if he was not married how could he have any children.

The wonder is that when the records of various examinations to which the parent is subjected upon his successive entries into the United States are all taken together more material discrepancies do not arise, either from a failure to understand the

questions propounded from incorrect interpreting or error in transcribing shorthand notes.

(8) And now we come to the determining discrepancy upon which great importance is placed by the board. Which of the father's five sons is dead? The father says, as appears from the last record, that it is his third son Lam You, while the applicant says it is Lam Shee, the second son. The record shows also that the father stated in 1919 that Lam Shee was dead. An examination of the father's testimony in record No. 18504, 3-7, page 23, shows that he said his third son was dead, and the record in the present case shows that he said, "I forgot their names on account of having the sons deported and I get worried and forget." The fact is, as appears from all the testimony, that the third son is the one who is dead, whether his name be Lam Shee, Lam Youen or Yam You, and it is not surprising that the names should become confused in the father's mind, and that upon repeated questioning he might make a mistake as to one of the names of the deceased.

(9) Another reason set up by the immigration authorities as to why this applicant should be denied admission is that the second wife of the father was deported from the United States as a prostitute. This question has no legal or probative bearing upon the right of appellant here to enter the United States, but is dragged into the record perhaps for the purpose of discrediting his father, and certainly in the hope that it would

prejudice the right of the applicant to enter this country.

(10) The father testified that he first became acquainted with the additional witness Lim Huey Lun in San Francisco in the store of Him Yik Co. on Grant Avenue, San Francisco. The additional witness says he knew the father since the father was three or four years old in the Spanish House on Dupont Street. The board cites this as a discrepancy. The fact is the additional witness, as shown by the record, is five or six years older than the father who went to China when he was only six or seven years old, in 1880 or 1881, and does not remember seeing Lim Huey Lun prior to returning from China in 1902. It is obvious that the older remembers the younger, while the younger does not remember the older. This is no discrepancy, but is seized upon by the board as an additional reason why this applicant should be denied admission to the United States. I might say further that Grant Avenue and Dupont Street are the same street, which fact may or may not have been known by the examining board, but of which fact I think this court is well aware.

(11) The alleged discrepancy concerning how and where the father and the additional witness happened to meet in 1909 is inconsequential. The father says they met in Him Yick Lung Co. on Grant Avenue after a telephone call from Lim

Sing. Lim Sing says they happened to meet outside of Hip Him Yung Co. on Dupont Street. In view of the fact that Grant Avenue and Dupont Street are one and the same, and the stores mentioned are in the same vicinity, it is obvious that they are getting pretty close together in their recollection of an unimportant event which happened ten years before they were called upon to testify in regard thereto.

(12) The final discrepancy relied upon by the board is that the father claims that the additional witness has been working for white people, while the additional witness says he has not worked for white people since 1906. An examination of the record shows that the statement of the father was with reference to the year 1909, and that the witness had worked for white people within three years prior to that date. Both statements may be true without any contradiction.

From the foregoing statement it is clear that the board of special inquiry and the Assistant Commissioner assumed facts which were not in the record, misconstrued the testimony of witnesses, and gave way to matters which were not legal evidence to such an extent as to constitute an abuse of discretion, and to deny the applicant the fair hearing and consideration of his case to which he was entitled. The district court erred in not so holding, and notwithstanding the decision in the

case of *White v. Yung Yen and Yung Soon,* No. 3751, decided by this court on February 6, 1922, I believe that this court should correct the error which has been done and direct that the district court give the appellant a hearing on the merits on his petition for a writ of habeas corpus.

Dated, San Francisco,
October 14, 1922.

Respectfully submitted,

M. A. THOMAS,
Attorney for Appellant.